Filed 6/9/17 In re Hampton CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re JONATHAN HAMPTON on Habeas Corpus	C081634 (Super. Ct. No. 14HC00477)

In February 2009, a jury found defendant Jonathan Hampton guilty of second degree murder, (Pen. Code, §§ 187, 189)[1] and the conviction was upheld on appeal. Following the denial of his state and federal habeas corpus petitions, defendant filed a new habeas corpus petition in state court, arguing for the first time that trial counsel rendered ineffective assistance by failing to request an instruction on heat of passion voluntary manslaughter (CALCRIM No. 570) as a lesser included offense to murder. The trial court requested further briefing on several issues, including whether the trial judge had a sua sponte duty to instruct the jury with CALCRIM No. 570, and the standard of prejudice that should be applied to an erroneous failure to instruct on a lesser

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1 Undesignated statutory references are to the Penal Code.

included offense. Following the parties' submissions, the trial court granted defendant's habeas corpus petition, concluding the trial judge erred in failing to sua sponte instruct the jury with CALCRIM No. 570, and the error was not harmless under the heightened standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*) [holding federal constitutional error requires reversal unless the error is harmless beyond a reasonable doubt].

The People appeal pursuant to section 1506. On appeal, the People contend defendant's habeas corpus petition is procedurally barred because there has not been a change in law to justify the petition. The People further argue the habeas petition is procedurally barred because it is untimely and successive. In addition, the People contend the trial court did not have a sua sponte duty to instruct the jury with CALCRIM No. 570 because the record does not contain substantial evidence to support a heat of passion voluntary manslaughter instruction.

We conclude the trial court erred in granting defendant's habeas corpus petition. Defendant's habeas corpus petition is procedurally barred because there has not been an intervening change in law to justify consideration of the instructional error raised by defendant for the first time in his new state habeas corpus petition.

Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A.

Factual Background

The following facts are taken from our opinion denying defendant's appeal. (*People v. Hampton* (Oct. 26, 2010, C061681) [nonpub. opn.].)

"On February 15, 2007, 19-year-old Jonathan Giurbino was planning on traveling to San Diego with his family. His mother had given him three $100 bills and a $50 bill ahead of the trip. Giurbino told a friend a few days earlier that he wanted to take

marijuana and around 100 Ecstasy pills with him to San Diego because he had a friend there that could sell the drugs for him and get $20 for each Ecstasy pill. Giurbino said he had found a connection that could get him what he needed. He named the person who could get him the drugs as a man named J–Bird. He said he was going to meet with J-Bird before he left for San Diego.

"Brian Lehr worked with Giurbino for a few months. Lehr remembered an occasion when defendant drove up in a Toyota as Lehr and Giurbino were walking door-to-door doing their job. Giurbino spoke with defendant. Lehr joined them near the end of their conversation and heard defendant tell Giurbino that he (defendant) could get them pretty much any drugs they wanted. Defendant identified himself as J–Bird. On the morning of February 15, 2007, Giurbino called Lehr and asked for a ride to meet J–Bird. Giurbino told Lehr he wanted to take some good stuff, which Lehr understood to mean marijuana, down to San Diego. Lehr had seen Giurbino smoke marijuana.

"A gas station surveillance tape of February 15, 2007, showed Giurbino shortly before 11:00 a.m. getting out of the passenger seat of a car, pumping gas into the car, and then producing a wallet to pay the cashier $15.

"Charles Barr was cleaning a pool at a home on Fordham Way in Sacramento County on February 15, 2007. At around 11:30 a.m., he heard what he thought was a car backfire, followed by a 'thump, thump' noise. The backfire sound could have been a gunshot. After the thump, thump, he heard an engine roar and tires skidding like a car was 'peeling out.' As he walked to his truck, he saw a car leaving the area. He then noticed a young man (Giurbino) lying in the street. Giurbino had been shot in the head. Barr called 911.

"Ronald Blubaugh was taking a walk on Fordham Way around the same time. He noticed a dark Japanese car pass him very quickly. The driver was a young man

with dark complexion, black hair and Asian eyes. He looked angry. As Blubaugh continued to walk, he saw a young man lying in the street with blood coming from his head. A picture of the driver Blubaugh saw, drawn by a sketch artist, was admitted at trial.

"Giurbino was taken to the hospital by ambulance, but died from the gunshot wound to his head. Giurbino had no wallet or money with him. A second wallet he owned was found at his home. It contained a $50 bill, fourteen $20 bills, and a piece of paper with the name J-Bird and J-Bird's phone number on it. Giurbino's mother said the $20 bills were from cashing a check. She did not know if the $100 bills had been broken into twenties.

"Defendant's sister-in-law, Danielle Hampton, testified she and her husband (defendant's brother) had allowed defendant to use their Toyota Corolla for two or three months on the condition defendant pay $200 per month towards insurance. Defendant was not holding up his end of the deal and was supposed to be bringing the car back on February 15, 2007. Defendant brought the car back late, arriving around noon. Defendant looked sweaty. His clothes were dirty and his hair was messy. Defendant insisted on immediately cleaning the car and took a trash bag and wet towel offered for that purpose. Later forensic examination of the car showed hair, blood, and human tissue on the car. A bullet shell was found in the car.

"In an interview with police, Tiana Robinson, defendant's girlfriend, said defendant was with her in her room on the afternoon of February 14. At that time, defendant showed her a handgun that he had just bought. She knew defendant used marijuana and pills. She knew he sold marijuana and had seen him with cash. After his arrest, defendant wrote letters to Robinson's brother Vincent expressing concern that Robinson would testify to seeing defendant with a gun. Defendant urged Vincent to

kidnap and 'tuct' Robinson away, even though 'he got smacked with his own banger [gun].'

"Robinson's other brother Alonzo Smith was a friend of defendant. On February 15, 2007, Smith called defendant sometime in the morning and asked to borrow some money to put tires on his car. Defendant came to the tire store and gave Smith $50. Defendant called Smith later to ask for a ride from his brother's house. Smith met up with defendant, who gave him a $100 bill to buy something to eat at Panda Express. Smith later drove defendant to Rancho Cordova. In a search of Smith's bedroom, officers found a loaded .380–caliber handgun. Smith claimed defendant did not even know Smith had the gun.

"When interviewed on February 16, Smith told detectives that defendant told him nothing about what had happened. However, in a later interview and then at trial, Smith claimed defendant told him when he called for a ride that something was wrong; that somebody had tried to do something to him; that a 'dude tried to play' him. Smith understood defendant to be saying someone tried to rob him.

"When interviewed by the police, defendant initially denied having any involvement in the shooting of Giurbino. Eventually, defendant admitted shooting Giurbino, but claimed it was in self-defense.

"Defendant testified in his own defense at trial. He admitted he was a marijuana and Ecstasy user and that he made a living from selling marijuana, powder cocaine and Ecstasy. He admitted his nickname was J–Bird and that he had met Giurbino and offered to sell him drugs.

"Defendant testified Giurbino phoned him on February 15. Giurbino wanted to purchase a large quantity of marijuana and Ecstasy. He was in a hurry because he was leaving for San Diego. When defendant told Giurbino that he could not provide the drugs until that evening, Giurbino talked about getting the Ecstasy pills from a friend's

connection who lived near Sacramento City College. Giurbino said he could get 100 pills for $400, which was less than the $5 defendant was paying for each Ecstasy pill. Defendant agreed to drive Giurbino to get the drugs so that he could purchase some pills too. Defendant stopped at a tire store to give Smith $50 for tires before picking up Giurbino at a Circle K. Defendant then made stops at a gas station, where Giurbino was videotaped, and a fast-food restaurant. Finally, Giurbino directed him to the house of his drug connection. Defendant and Giurbino shared a marijuana 'blunt' on the way. Giurbino was fidgety and tense.

"Defendant testified that as he pulled into a driveway, stopped, and put the car into park, he felt a gun at his temple and heard the click of a hammer being pulled back. Giurbino said: 'Give me all your fucking money, dog.' Holding the gun in his left hand, Giurbino used his right hand to reach across defendant, tap defendant's pockets, and pull out a wad of money from defendant's left pocket. Giurbino opened the passenger door and put his right foot out. As he did so, he looked at defendant, pointed the gun at him, and told him to not move. Giurbino then scooted out of the car. Leaning back inside the car, Giurbino reached for his sweater and other belongings while still pointing the gun at defendant.

"As Giurbino reached for his sweater, defendant claimed to have acted without thinking. Defendant grabbed the gearshift and slammed the car into reverse. The car jerked. Giurbino's hand holding the gun hit the ceiling. The gun bounced off the ceiling and landed in defendant's lap, pointing towards defendant's left hip. Defendant continued in reverse, but Giurbino was able to regain his balance and walk with the car down the driveway. It seemed to defendant that Giurbino had a grin on his face and defendant thought he was crazy. Defendant stepped on the gas pedal and tried to make a turn out of the driveway onto the street. As defendant braked and reached for the gearshift, defendant saw Giurbino lunge toward him. Giurbino's left hand was holding

the top rim of the car and his right hand was reaching inside the car, across the passenger seat and center console to just above defendant's right thigh. Giurbino's eyes were looking in the direction of the gun on defendant's lap. Defendant was 'real scared' because he knew the gun was loaded from the clicking sound and that it might accidentally go off if Giurbino touched it. Scared that he would be shot, defendant swooped up the gun to prevent Giurbino from reaching it. Defendant swung his arm out towards Giurbino. The gun went off. Defendant saw Giurbino's head open up.

"Defendant testified he never consciously thought of trying to shoot Giurbino and when the gun went off, he was stunned. Defendant did not actually see Giurbino fall out of the car. Defendant did not look back; he just drove off. Defendant saw blood inside the car and thought there was probably blood on the outside of the car. Defendant panicked and threw the gun out of the passenger window as he was driving on the freeway. He drove the car back to his brother's house.

"At his brother's house, defendant decided to clean the car. He gathered up Giurbino's sweater, wallet and cell phone, along with the money Giurbino had taken out of defendant's pocket, and put them in a garbage bag. Defendant went to the carwash where he disposed of the garbage bag and washed and vacuumed the car. He called Smith and asked him to meet him at a supermarket parking lot. When he met up with Smith, Smith was hungry. Defendant dipped into his pocket and ended up giving Smith a $100 bill for food.

"Defendant was arrested the next day and interviewed. At trial, defendant was cross-examined in detail about his interview with the police and admitted he lied multiple times in his statements to them.

"Defendant admitted belonging to a group called the Killa Mob Gangsters, but said he was a hustler, not a gangster."

B.

Procedural Background

A jury acquitted defendant of first degree murder, but found him guilty of second degree murder. (§§ 187, 189.) (*Hampton, supra*, C061681.) The jury found true the allegation defendant had personally used a firearm in the commission of the offense (§ 12022.53, subd. (b)), but found untrue the allegations defendant had personally and intentionally discharged a firearm in the commission of the offense (§ 12022.53, subd. (c)) and had personally and intentionally discharged a firearm causing great bodily injury or death in the commission of the offense (§ 12022.53, subd. (d)). (*Hampton, supra*, C061681.) The trial court sentenced defendant to serve an aggregate term of 25 years to life in prison. (*Hampton, supra*, C061681.)

On appeal defendant argued two instructional errors. (*Hampton, supra*, C061681.) First, he contended the trial court failed to sua sponte include in the instruction it gave on self-defense (CALCRIM No. 505) the portion informing the jury the defense also lies for a person who resists a forcible and atrocious crime such as robbery. (*Hampton, supra*, C061681.) Second, he contended the instruction given by the trial court regarding the jury's consideration of any false and misleading statements made by defendant (CALCRIM No. 362) improperly invited its application to defendant's testimony itself. (*Hampton, supra*, C061681.)

We affirmed the judgment, (*Hampton, supra*, C061681) and defendant's petition for review was subsequently denied in January 2011. After his state habeas corpus petition was denied by our Supreme Court in July 2012, defendant filed a federal habeas corpus petition. The federal district court denied the petition in May 2013, and the Ninth Circuit Court of Appeals denied defendant's request for a certificate of appealability in April 2014.

In August 2014, defendant filed a new state habeas corpus petition, arguing for the first time that trial counsel rendered ineffective assistance by failing to request that the trial court instruct the jury on heat of passion voluntary manslaughter (CALCRIM No. 570) as a lesser included offense to murder. The trial court requested briefing on several other issues, including the issue of whether the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 570 on heat of passion voluntary manslaughter. The trial court also requested briefing on the standard to be applied when the trial court errs by failing to sua sponte instruct the jury on a lesser included offense.

In February 2016, the trial court granted defendant's habeas corpus petition, concluding the trial court's failure to sua sponte instruct the jury with CALCRIM No. 570 was error and the error was not harmless beyond a reasonable doubt under *Chapman, supra,* 386 U.S. 18. In so concluding, the trial court found defendant's habeas petition was not procedurally barred because, even though the claim could have been raised on appeal, there was a change in law after the appeal that affected him, citing *People v. Thomas* (2013) 218 Cal.App.4th 630 (*Thomas*).

The People filed a timely appeal.

DISCUSSION

The Procedural Bar on Defendant's New Habeas Corpus Petition

The People contend defendant's habeas corpus petition is procedurally barred because there has not been a change in law to justify his post-appeal petition.[2] We agree.

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[2] Defendant argues the People forfeited this argument by failing to raise it in the trial court. The record reflects the People did not raise this argument. However, because the issue raised by the People involves a pure question of law applied to undisputed facts, we exercise our discretion to consider it. (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 436.)

"Habeas corpus may . . . provide an avenue of relief to those unjustly incarcerated when the normal method of relief-i.e., direct appeal-is inadequate." (*In re Harris* (1993) 5 Cal.4th 813, 828.) "Proper appellate procedure . . . demands that, absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance. Accordingly, an unjustified failure to present an issue on appeal will generally preclude its consideration in a postconviction petition for a writ of habeas corpus. [Citation.] '[H]abeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors *could have been, but were not,* raised upon a timely appeal from a judgment . . . .' [Citations.]" (*Id.* at pp. 828-829.) One of the special circumstances excusing a failure to raise an error on appeal is a change in law. (*Id.* at p. 841.) A petition based on a change in the law will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial. (See *In re Clark* (1993) 5 Cal.4th 750, 775 [change in law justifies successive habeas corpus petition].)

We conclude the trial court erred in granting defendant's habeas corpus petition. Contrary to the trial court's conclusion, there has not been a change in law to justify consideration of the instructional error raised by defendant for the first time in his successive habeas petition. In finding defendant's instructional error claim was not procedurally barred, the trial court erroneously determined *Thomas* created a new rule of law. In *Thomas*, the First Appellate District considered the applicable standard for assessing prejudice after the California Supreme Court transferred the case back with directions to consider whether refusal to instruct the jury on heat of passion voluntary manslaughter amounted to federal constitutional error. (*Thomas, supra,* 218 Cal.App.4th

at p. 633.) Although the *Thomas* court had initially applied the *Watson*[3] test, after the transfer it concluded the *Chapman* standard applied. (*Thomas,* at p. 633.) The court held the trial court's failure to instruct the jury on heat of passion voluntary manslaughter (CALCRIM No. 570) as a lesser included offense of murder was federal constitutional error. (*Id*. at pp. 643-644.) It reasoned heat of passion negates malice, and malice is a necessary element of murder; thus, failure to instruct on heat of passion unconstitutionally lessens the prosecution's burden of proving every element of the charged crime. (*Id*. at p. 644.) In concluding the *Chapman* standard applied, the court explained that "this case concerns the court's duty to give a requested instruction, not the sua sponte duty to instruct [on a lesser included offense] at issue in [*People v.*] *Breverman* [(1998) 19 Cal.4th 142]." (*Thomas,* at pp. 643-644.) The People's petition for review of the revised *Thomas* decision was denied. (See *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1146.)

Our Supreme Court has held that "the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. . . . [S]uch misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 165 [applying *Watson* standard to a failure to instruct on heat of passion voluntary manslaughter]; accord *People v. Blakeley* (2000) 23 Cal.4th 82, 93; *People v. Randle* (2005) 35 Cal.4th 987, 1003, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; *People v. Beltran* (2013) 56 Cal.4th 935, 955.) Accordingly, we conclude *Thomas* did not create a new rule of law regarding the standard for assessing prejudice when, as here, the trial court fails to instruct sua sponte

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3 *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

on a lesser included offense in a noncapital case. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[4]

DISPOSITION

The trial court's order of February 20, 2016, granting defendant's habeas corpus petition is reversed.

/s/
HOCH, J.

We concur:

/s/
HULL, Acting P. J.

/s/
MURRAY, J.

[4] Our conclusion that defendant's new habeas corpus petition is procedurally barred obviates the need to consider the People's arguments (1) defendant's petition is redundantly barred as untimely and successive, and (2) the trial court did not have a sua sponte duty to instruct the jury with CALCRIM No. 570 because the record does not contain substantial evidence to support a heat of passion voluntary manslaughter instruction.